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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-199667

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DATE: October 7, 1980

MATTER OF: Frank A. Fishburne - [Establishment of  
Separation Date]

**DIGEST:** Employee chose to remain in pay status beyond February 29, 1980, due to uncertainty whether he could return to SES position as reemployed annuitant. He submitted retirement application on March 11, 1980. Agency may not make retirement date retroactively effective February 29th in order to increase annuity. Effective date of separation is last date employee is carried on the rolls, and employee in pay status may not waive right to compensation to set back date of entitlement to annuity under 5 U.S.C. § 8345(b). Finally, no administrative error is found to justify relief under Back Pay Act.

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The Office of Personnel Management (OPM) has asked our opinion concerning the authority of the Department of the Air Force to approve a retroactive separation date for Mr. Frank A. Fishburne, a Senior Executive Service (SES) employee of the Department. For the reasons set forth below, we conclude that the Air Force may not approve a retroactive separation date. AGCD0035

Mr. Fishburne was employed as Deputy Comptroller of the Air Force, a career reserved SES position. Early in January 1980, Mr. Fishburne expressed his desire to retire effective February 29, 1980, the last date on which he could retire and obtain a cost of living increase payable to Federal retirees on March 1, 1980. Due to a large number of vacancies in high level Air Force positions, Mr. Fishburne agreed to continue working as a reemployed annuitant after his retirement. However, problems arose when the Air Force contacted OPM about the feasibility of this plan and was advised that reemployed annuitants could not be placed in career reserved SES positions, but could only be returned to general positions with a limited appointment. If Mr. Fishburne had retired and accepted reemployment in

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a general SES position, he would have been required to forego certain benefits. Moreover, his reemployment would have required the Air Force to redesignate his position as a general position and that would have been extremely difficult to justify. Consequently, Mr. Fishburne decided not to pursue his retirement at that time.

On February 26, 1980, OPM upon reconsideration, determined that reemployed annuitants could serve in SES career reserved positions. On February 27, 1980, this guidance was provided the Air Force in writing. This OPM determination effectively removed the obstructions to Mr. Fishburne's retirement and reemployment.

The Department of the Air Force did not have an opportunity to transmit a message to its major commands conveying the new guidance from OPM. Mr. Fishburne's supervisor was informed of the OPM policy decision on February 27th, and he called Mr. Fishburne who was on temporary duty travel at the Air Force Finance Center in Denver from February 26-29th. However, the supervisor did not have the official notification of OPM's policy determination. Therefore, Mr. Fishburne apparently felt he was not in a position to make an informed decision to retire at that time. He did not submit his retirement application until March 11, 1980.

On March 11, 1980, the supervisor wrote a memorandum to the Deputy Chief of Staff, Manpower and Personnel, stating the chronology of these events. He asked that action be initiated which would allow Mr. Fishburne to officially retire as of the 29th of February and return as an annuitant on the 1st of March. He based this request on: (1) the fact that Mr. Fishburne had initiated the action early in January 1980; (2) the change in OPM guidance; and (3) the lack of official communication with him or Mr. Fishburne about the change, which prevented Mr. Fishburne from making an informed decision concerning his retirement before March 1, 1980. The Air Force proceeded on the understanding that this could be done. Mr. Fishburne's

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retirement application was processed with an effective date of February 29, 1980, and he was considered reemployed as an annuitant as of March 1, 1980. A memorandum explaining the circumstances was attached to Mr. Fishburne's retirement application which was forwarded to OPM for processing.

In requesting our opinion, the Office of Personnel Management states that the Civil Service Retirement law (5 U.S.C. § 8331 et seq.) does not authorize the Air Force to approve a retroactive separation date for Mr. Fishburne. OPM, however, believes that the Back Pay Act, 5 U.S.C. § 5596, allows a retroactive separation, based on the conflicting advice from OPM concerning eligibility for reemployment in the SES that prevented Mr. Fishburne from making an informed retirement decision prior to March 1, 1980.

As to the effective date of separation, the Federal Personnel Manual (FPM) Supplement 296-31, Book III, § S1-4(a) (February 25, 1980), provides that:

"The effective date of separation is the last date on which the employee is carried on the rolls \* \* \*."

The Air Force Supplement to FPM Supplement 296-31, ch. III, § S1-4b (December 15, 1978), further explains:

"Separations are effected the last day the employee is carried on the rolls. In the case of a resignation this is the date specified by the employee. In no case is the date established earlier. (Emphasis added).

The conclusion that Mr. Fishburne's retirement date cannot be established retroactively is supported by the general rule that once an employee's separation is an accomplished fact the date of separation may not be changed. 22 Comp. Gen. 291 (1942). This Office has permitted exceptions to the rule against retroactive separation dates where the separation did not conform

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to the intention of the parties. See B-131720, May 16, 1957, and B-159889, September 1, 1966.

In the instant case there is no evidence that Mr. Fishburne's separation was effected under a mistake of law or fact. Although Mr. Fishburne originally intended to retire on February 29, 1980, it was clearly his intention to delay his retirement and continue in his position with the Air Force beyond that date. The uncertainty surrounding OPM's policy on the reemployment of annuitants does not justify the retroactive establishment of Mr. Fishburne's retirement date. Our Office has encountered analogous cases where retiring employees, who were unaware of new legislation or were influenced by speculation on pending legislation, selected retirement dates which later proved to be disadvantageous to them. In those instances the employees' requests for adjustment of their retirement dates were denied. See B-175164, July 26, 1972; B-171970, March 11, 1971; B-161206, April 21, 1967.

Moreover, since Mr. Fishburne remained on the Air Force rolls in a pay status until March 11, 1980, there is no authority to make an administrative change in salary on a retroactive basis in order to enable his annuity to commence earlier under 5 U.S.C. § 8345(b). It provides that an employee's annuity "commences on the day after he is separated from the service or on the day after his pay ceases and he meets the service and the age or disability requirements for title to annuity." An employee who is in a pay status may not legally waive and refund compensation in order to have his retirement date set back retroactively to an earlier date. Edward J. Ogletree, B-189897, September 5, 1978. As stated therein, we have consistently held "\* \* \* that it is contrary to public policy for an appointee to a position in the Federal Government to waive his ordinary right to compensation or to accept something less when the salary for his position is fixed by or pursuant to legislative authority \* \* \*." See court cases cited and 54 Comp. Gen. 393 (1974); 27 id. 194 (1947); 26 id. 956 (1947). Hence, we find no basis for a retroactive change in Mr. Fishburne's pay status.

The Office of Personnel Management suggests that the Back Pay Act, 5 U.S.C. § 5596 (1976), may serve as

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a means by which to establish an earlier separation date in this case, based on administrative error. This Office has made exceptions to the general rule against retroactive personnel actions "\* \* \* where administrative or clerical error (1) prevented a personnel action from being effected as originally intended, (2) resulted in nondiscretionary administrative regulations or policies not being carried out, or (3) has deprived the employee of a right granted by statute or regulation." Douglas C. Butler, B-192295, November 1, 1978, 58 Comp. Gen. 51, 53. See also 55 Comp. Gen. 42 (1975); 54 Comp. Gen. 888 (1975). The second and third exceptions do not appear to be applicable to Mr. Fishburne.

As to the first exception, Mr. Fishburne was aware of the fact that he would lose the cost of living increase if he were to remain in a pay status with the Air Force beyond February 29, 1980. Although he may have originally intended to retire on February 29, he changed his mind and chose to stay on the rolls beyond that date. It is reasonable to assume that he understood that such action would cause a forfeiture of his right to receive this benefit. No one misled him as to his rights and, in fact, his Air Force supervisor went out of his way to notify Mr. Fishburne of the policy change by OPM. The policy change removed the obstruction to his retirement prior to March 1. Nevertheless, Mr. Fishburne, as he was entitled to do, chose to remain on the rolls rather than retire before March 1. There was no administrative error involved and, until March 11, 1980, there was no retirement application submitted by Mr. Fishburne and no prior administrative intent to separate Mr. Fishburne can be shown. Therefore, we are unable to agree that OPM or the Air Force committed an unwarranted personnel action under the Back Pay Act so as to provide a basis for allowing a retroactive separation date. See B-175869, August 7, 1972.

Accordingly, we must conclude that Mr. Fishburne's retirement date may not be made retroactive to February 29, 1980.



For the Comptroller General  
of the United States